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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SANTANA, Defendant and Appellant.	H044594 (Monterey County Super. Ct. No. SS161528A)

Defendant Jose Santana appeals from a judgment of conviction of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)).[1] After a jury found defendant guilty as charged, the trial court found true a prior strike conviction allegation under the Three Strikes law (§ 1170.12), a prior serious felony enhancement allegation (§ 667, subd. (a)(1)), and two prior prison term allegations (§ 667.5, subd. (b)). Defendant was sentenced to a total prison term of 18 years.

On appeal, defendant argues that (1) a statement that he made to police was erroneously admitted at trial in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), (2) his trial counsel provided ineffective assistance in several instances, (3) the cumulative prejudice of the alleged errors requires reversal, and (4) the case must be remanded to allow the trial court to exercise its discretion to strike the five-year prior

[1] All further statutory references are to the Penal Code unless otherwise stated. Defendant has also filed a petition for a writ of habeas corpus, which we have considered together with this appeal. We dispose of the writ by separate order.

serious felony enhancement under section 1385, as recently amended. We agree with only his fourth contention.

Accordingly, the judgment is reversed for the limited purposes of resentencing.

I

Evidence

On September 13, 2016, J.F. lived in the City of Salinas. On that date J.F. called 911 from his apartment, and a recording of the call was played for the jury at trial. The 911 call occurred at 11:01 a.m. and two seconds. Salinas police officers were dispatched at 11:03 a.m. and 26 seconds. At 11:07 a.m. and 28 seconds, Officer Knowlton and Officer Yoneda were on the scene and contacting defendant. Defendant was detained at 11:08 a.m. and 35 seconds.

When the 911 operator asked J.F. to state the emergency, J.F. said that the apartment next door had been broken into and was being burglarizing and that someone was waiting outside for them in a white truck. J.F. gave his address and indicated that it was his neighbor to his left. J.F. said that "two guys" had gone inside and that the white truck that was waiting for them had paper dealer plates, which he thought said C & J Auto Sales. He repeated that two persons were inside the home and one person was in the vehicle. J.F. indicated that he was hearing a lot of noise, which sounded like they were "searching through everything" next door. When asked how the intruders got in, J.F. said, "I just heard a loud noise, they broke something, I don't know [whether] it was the window or the door." J.F. indicated that he could still hear noise coming from his neighbor's home, but the noise was now coming from the back.

When the 911 operator asked J.F. whether the car was still there, J.F. said that an officer had already arrested the truck's driver. The operator asked whether the officer "got the correct vehicle," and J.F. indicated that he had. When the operator tried to get J.F. to look out the window and report whether anyone was running away, J.F. said, "I'd rather they not recognize me." He said that he was not watching anymore and that he

was "really scared." After the operator thanked J.F. for the call and indicated that they were going to try to catch the burglars, J.F. reiterated that he was scared.

At trial, J.F. testified that he arrived home at approximately 10:15 a.m. on September 13, 2016, and at approximately 11:00 a.m. he was making his lunch in his kitchen, which was at the back of his home. When he looked out the window, he saw a vehicle, which he described as a white truck, parked out on the street.

Although J.F. said that he had been "very scared at the time" he saw the vehicle, he confirmed that the vehicle that he had seen was identical or "practically identical" to the vehicle in the prosecutor's photographic exhibits that were shown to him at trial. Those photographs were of a white Chevy Tahoe. One view showed that the vehicle had green paper dealer plates that said JC Auto Sales. The vehicle that J.F. had seen had paper dealer plates; J.F. had not seen a license plate.

While on the witness stand, J.F. asked the prosecutor why he was putting up a photograph of his residence. A short time later, J.F. told the prosecutor, "You're exposing me really bad here" and "I should have never came." He subsequently said, "All I need to do is work. I don't need to be looking at stuff like that."

When asked at trial whether he had seen any individuals in the vehicle that he had seen outside his residence, J.F. answered, "[N]o, and I didn't see very well." When asked how many people he had seen inside the vehicle, J.F. replied, "I didn't see them." J.F. was asked, "Did you see anybody get out of the vehicle that's depicted in 7, 8, and People's 14?" J.F. replied no.

At trial, J.F. recalled that he had called police because he was hearing a lot of noise next door, and he indicated that he had been telling the truth when he called 911. The prosecutor reminded J.F. that his 911 call had been recorded and again asked, "Prior to hearing the noises next door, did you see anybody get out of the vehicle that's in 7, 8, 14." J.F. then said, "I only saw somebody go by on the sidewalk, but I didn't see where they came out of or anything or get off of or anything." He claimed that he did not

remember telling the 911 dispatcher that two people had gotten out of a truck and gone toward his neighbor's home. J.F. stated that he was "too afraid at the moment." The prosecutor asked, "[W]ere you too afraid at the moment or are you too afraid right now to remember?" J.F. replied in part, "In the moment and now. I mean because I called the police, now look at where I'm at. . . ."

The one-story apartments of J.F. and his adjoining neighbor were set back from the street named in their street addresses. In front of their apartments were a walkway and a driveway that went to the complex's parking area and then beyond that was a fence and a long, one-story building that fronted the street named in their street addresses. The driveway was entered from a named side street that intersected with the street named in their apartments' street addresses. J.F.'s apartment was the end unit and adjacent to that side street.

After reviewing the transcript of the 911 call at trial, J.F. indicated that he remembered that two people got out of the truck, which was parked on the named side street. J.F. indicated that they approached the adjoining apartment while the driver stayed in the truck.

J.F. testified that he noticed that the vehicle had paper dealer plates from the first moment he saw it. When asked where the two people who had gotten out of the truck had gone, J.F. repeatedly responded that he had already answered that question. He stated, "I mean just because I called the police, the mess I got myself into."

J.F. finally indicated at trial that the two people who had exited the vehicle had walked by his apartment on the driveway, toward his neighbor's door. Less than 30 seconds later, J.F. heard knocking on his neighbor's door. Within a few minutes. J.F. heard a loud bang that sounded as if a door was being knocked down. J.F. initially claimed at trial that he did not hear anything else after that. J.F. subsequently indicated that he had heard noises in his neighbor's apartment, which sounded like people were

searching through it. While J.F. was hearing banging noises inside his neighbor's home, someone "stepped on the gas or accelerated three times."

J.F. initially professed that after seeing the people get out of the vehicle, he did not look out his window again and did not see police officers approaching or contacting the driver. He claimed that his 911 statement that officers had arrested the driver was not true.

J.F. subsequently indicated that he had seen the vehicle arrive, leave after dropping two people off, and return and park in the same spot on the named side street across from his apartment. J.F. testified, "It got there and left and then it came right back. It was a matter of a minute." J.F. confirmed that he had told the 911 dispatcher that the vehicle was a white Ford Explorer. He agreed that he was nervous while he was on the 911 call.

J.F. also remembered that on the 911 call he was asked whether the police had the correct vehicle and responded "Uh-hum," and he testified that he did so "because it was that vehicle, yes." He affirmed that the person contacted and arrested by police was the driver of that vehicle. J.F. confirmed that during the 911 call, he was telling the truth and describing events close in time to their occurrence. At trial, J.F. agreed that during the incident he was scared to be identified and concerned with his safety. He was trying not to look out the window. But he testified that when responding to the 911 dispatcher, "[he] did answer what [he] saw." J.F. indicated that he was also being truthful when answering Officer Aranda's questions when he was interviewed within an hour or so of his 911 cal1 on September 13, 2016.

At trial J.F. claimed, however, that he had never before seen defendant. He also stated that he did not see the truck's driver in court.

On September 13, 2016, Officer Yoneda with the City of Salinas was notified by dispatch of a possible residential burglary in progress. The officer responded in a marked patrol vehicle and arrived on the scene four minutes later, at approximately 11:07 a.m.

He saw Officer Knowlton driving toward "a white Chevy Tahoe with green paper plates." The plates said "JC Auto Sales." The vehicle was parked against the curb across the street from J.F.'s apartment. The front of the vehicle was facing the intersection. Officer Knowlton made contact with a person in the driver's seat, who was identified at trial as defendant.

Officer Yoneda's body camera was operating as he arrived at the scene, and the recording captured Officer Knowlton's initial interaction with defendant, who was sitting in the vehicle. The part of the recording showing that interaction was played for the jury.

Knowlton made a gesture with his hands indicating that defendant should put his hands up. Defendant put his hands up. Officer Knowlton opened the driver's door, told him to take off his seatbelt, and had defendant place his hands behind his back. While defendant was still seated in the driver's seat and while Officer Knowlton appeared to be in the process of placing defendant in handcuffs behind his back, the officer twice asked defendant where his friends were. Defendant did not seem surprised by the question. Defendant responded that he did not have any friends.

Officer Knowlton asked defendant whether he had any weapons on him and then removed defendant from the vehicle and placed him in the back of Officer Yoneda's patrol vehicle.

Officer Yoneda testified that it took several minutes to recontact the reporting party and determine the residence being burglarized. A perimeter was set up around the residence because of the possibility that the suspects were still inside. A team of officers was assembled to go in and the officers entered through a door that was standing open.

Froylan Aranda, a Salinas police officer, received a dispatch regarding an in-progress burglary at approximately 11:03 a.m. on September 13, 2016. When he arrived, Officer Aranda saw defendant, who was being detained. Officer Aranda helped secure the perimeter of the residence. According to the officer, police treat a burglary as an armed situation since the burglars may have weapons.

After no one responded to multiple police demands to come out with hands up, police officers entered the residence. Each room of the apartment was "cleared" for any individuals that might have been there. The interior had been ransacked. A door had been broken, cabinets had been opened, and multiple items had been thrown on the floor. No one was located inside.

Jacqueline Bohn, a Salinas police officer, responded to a dispatch of a possible residential burglary in progress at approximately 11:03 on September 13, 2016. When she arrived, the officer saw an individual sitting in the back of a patrol vehicle and a parked, white sport utility vehicle (SUV). It was discovered that the SUV's paper plates concealed actual license plates. She searched the vehicle and found an electronic scanner, which scanned police and fire channels, in a cup holder in the vehicle's center console. It was "facing the driver [if a driver had been sitting there] at a slant." The scanner was "on," and she "could hear officers speaking on [the Salinas Police Department's] Channel One radio," the channel on which she had received the dispatch and which was being used by the officers at the scene.

Officer Aranda attempted to contact the reporting party, J.F., at his residence and obtain a statement from him. J.F. appeared scared, looked around, and refused to speak to the officer. He did not want to identify the suspect driver in an in-field showup. Consequently, Officer Aranda did not read him a standard admonishment that asks a witness who participates in an in-field showup to tell the police whether the witness recognizes the suspect or does not recognize the suspect. The admonishment also cautions the witness not to be influenced by the fact the suspect is in handcuffs or in custody.

While at work on September 13, 2016, J.G. received a call from and spoke with Officer Aranda, who told him that his home, a one-bedroom apartment, had been broken into. After J.G. drove home, the officer spoke with him. J.G. had been asked whether he

recognized the man in the patrol vehicle, but he had not. At trial, J.G. stated that he had never seen defendant before.

After Officer Aranda spoke to the burglary victim and while they were standing near the white Chevy Tahoe, the officer happened to see J.F. and his family walking on the sidewalk toward home and attempted to speak with him again. At that point, defendant was still in the backseat of the patrol vehicle, which was parked across the street from where J.F. was standing.

Officer Aranda asked J.F. whether he was sure that he did not want to talk with the officer. J.F. told the officer that he did not want to speak "out in the open" or "be involved." Officer Aranda asked J.F. whether he could make an identification. J.F. made a quick eye movement, "a sign with his eyes" and "point[ed] with his eyes" toward defendant and said "that's him." When Officer Aranda asked him to go on record, J.F. said no. J.F. did not want to make an identification because he was scared and did not want the driver to know who he was. J.F. walked away with his family. The standard showup admonishment was never read to J.F.

Officer Aranda and the burglary victim then went into his apartment to ascertain what was missing. J.G. discovered that the back door to his apartment had been forced open, the locks had been broken, and the door frame had been damaged. His drawers had been rummaged though, and everything was on the ground. J.G. had a collection of approximately 30 pairs of sneakers, and the case that had held the shoe collection was empty. His Adidas Yeezy shoes by Kanye West, which were part of that collection and for which he had paid $800, were missing. Some of his belongings were in garbage bags "ready to go." J.G. did not find his PlayStation 4, the "newest one out," for which he had paid $400.

Afterward, Officer Aranda contacted the reporting party for a third time. J.F. agreed to speak with Officer Aranda at the back of his home, where nobody could see them. J.F. provided a more detailed description of the two men whom he had seen

leaving the vehicle and walking past his residence. He said that one man was wearing a gray hoodie and the other man was wearing a black hoodie. Their hoods were covering their heads, and J.F. was unable to clearly see their faces. Approximately a minute after the two men got out of the vehicle, J.F. heard knocking at his neighbor's door. J.F. told Officer Aranda that the driver in the white SUV had been looking in the direction of his neighbor's home.

Both the People and defendant rested their cases. Defendant presented no evidence.

II

Discussion

A. *Failure to give Miranda Warnings Before Initial Question to Defendant*

1. *Background*

Before trial, defendant filed a motion in limine to exclude defendant's statements on the ground that they were obtained in violation of *Miranda*. An evidentiary hearing was held. The following evidence was adduced:

Officer Yoneda received a dispatch regarding a possible residential burglary in progress at approximately 11:03 a.m. on September 13, 2016. The reporting party had said that two subjects had gone into the residence and one was waiting in a vehicle, originally described as a white truck but later described as "a white SUV of some type." Officer Yoneda arrived at the scene at approximately 11:07 a.m.

Officer Knowlton had arrived just ahead of Officer Yoneda and positioned his vehicle in front of a white Chevy Tahoe, which was parked at the curb. Officer Yoneda saw that the white Chevy Tahoe, an SUV, had "green paper plates."

At the hearing, Officer Yoneda described the safety concerns arising from the situation of a burglary in progress. He stated that Salinas had "a lot of gang crimes and many of the burglaries, robberies, [and other] crimes are committed by gang members" and that police officers "know that gang members often possess weapons." He explained

that when responding to a burglary, it was possible that people were at home and the crime was "a home invasion." He indicated that persons who commit home invasions are usually armed. In addition, since there were multiple suspects, the officers had to consider where the suspects could hide, the possibility of an ambush, and the possibility that the suspects might "run into an adjacent residence" where people were present.

At the time of the incident, Officer Yoneda saw Officer Knowlton get out of his vehicle and approach a person who was sitting in the driver's seat of the white Chevy Tahoe, a person whom Officer Yoneda identified in court as defendant. Officer Yoneda also got out of his vehicle and approached the white Chevy Tahoe. Because Officer Knowlton's vehicle was positioned in front of the white Chevy Tahoe, the white Chevy Tahoe could not go forward. Officer Yoneda's vehicle faced the white Chevy Tahoe and blocked a lane of traffic.

Officer Yoneda covered Officer Knowlton and looked into the back of the SUV to make sure that no one else who might be a threat was inside the vehicle. At that point Officer Yoneda did not know the layout of the home being burglarized or whether there were any residents inside. The reporting party had indicated that three persons were involved in the suspected residential burglary in progress.

Officer Knowlton indicated to defendant that the officer wanted him to put up his hands, and defendant did so. Officer Knowlton asked defendant to take off his seatbelt and to put his other hand behind his back. Officer Yoneda reported, "We've got one detained." Within seconds of approaching defendant in the vehicle, and at about the time Officer Knowlton was placing him in handcuffs, Officer Knowlton asked defendant, "Where your friends at?" Defendant responded, "I don't have any friends." After asking Officer Yoneda to move his vehicle, Officer Knowlton asked defendant, "Do you have any weapons on you?" Defendant said no.

When Officer Knowlton asked defendant about his friends, they were in public and Officers Knowlton and Yoneda were the only officers present. Officer Yoneda

described the officers' demeanor as "fairly friendly" in case there had been a mistake and there was not a residential burglary in progress.

The prosecutor argued that the limited questioning was aimed at safety and was constitutionally permissible as part of "investigatory questioning" or under the public safety exception to *Miranda.* Defense counsel argued that defendant was in custody for *Miranda* purposes when an officer asked about his friends because defendant's freedom of action had been significantly curtailed in that he was partially blocked in by police vehicles, the officer had approached and told him to put up his hands, and the officer had just placed him, or was in the process of placing him, in handcuffs when the question was asked. He argued that the safety exception to *Miranda* did not apply because there was no indication that the reported crime involved any weapons.

The trial court found it significant that defendant had been detained rather than arrested, that the question about defendant's friends was asked only seconds into the detention, the question was asked in public, the questioning had been limited, the officer's demeanor was not aggressive, and defendant's vehicle was blocked in only one direction. The court concluded that the limited questioning was not part of a custodial interrogation and that if it had found defendant to be in custody, the public safety exception to *Miranda* would have applied.

2. *Governing Law*

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'When reviewing a trial court's determination that a defendant did not undergo custodial interrogation,' an appellate court accepts the trial court's findings of historical fact if supported by substantial evidence, but independently determines 'whether, given those circumstances,' the interrogation was custodial. [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

In *Miranda*, the United States Supreme Court "adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination."[2] (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 269 (*J.D.B.*).) "[I]f a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a 'prerequisit[e]' to the statement's admissibility as evidence in the Government's case in chief, that the defendant 'voluntarily, knowingly and intelligently' waived his rights. [Citations.]" (*Id.* at pp. 269-270, fn. omitted.) "By its very nature, custodial police interrogation entails 'inherently compelling pressures.' *Miranda*, 384 U.S., at 467." (*Id.* at p. 269.) "Only those interrogations that occur while a suspect is in police custody . . . 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice. [Citation.]" (*Id.* at pp. 268-269.)

"[W]hether a suspect is 'in custody' [for purposes of *Miranda*] is an objective inquiry." (*J.D.B.*, *supra*, 564 U.S. at p. 270.) "[T]he 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant. [Citation.]" (*Id.* at p. 271.) *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda*, *supra*, 384 U.S. at p. 444, fn. omitted.)

For *Miranda* purposes, " 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." (*Howes v. Fields* (2012) 565 U.S. 499, 508-509 (*Fields*).) "In determining whether an individual was in custody,

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[2] *Miranda* requires four warnings, including that "a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [Citation.]" (*Dickerson v. United States* (2000) 530 U.S. 428, 435.) The United States Supreme Court "has not dictated the words in which the essential information must be conveyed. [Citations.]" (*Florida v. Powell* (2010) 559 U.S. 50, 60.) It is enough if the warnings given reasonably convey such *Miranda* rights to a suspect. (*Ibid.*)

a court must examine all of the circumstances surrounding the interrogation . . . ." (*Stansbury v. California* (1994) 511 U.S. 318, 322 (*per curiam*).) "[T]he initial step is to ascertain whether . . . a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*Fields*, *supra*, at p. 509.) Other "[r]elevant factors include the location of the questioning [citation], its duration [citation], statements made during the interview [citations], the presence or absence of physical restraints during the questioning [citation], and the release of the interviewee at the end of the questioning [citation]." (*Ibid*.)

The Supreme Court has explained: "To determine whether a suspect was in *Miranda* custody we have asked whether 'there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citations.] This test . . . is satisfied by all forms of incarceration. [The court's] cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. [The court has] declined to accord it 'talismanic power,' because *Miranda* is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated.' [Citation.] Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody. [Citations.]"[3] (*Maryland v. Shatzer* (2010) 559 U.S. 98, 112-113

[3] Traditionally, handcuffs have been viewed "as a hallmark of a formal arrest. [Citations.]" (*United States v. Newton* (2d Cir. 2004) 369 F.3d 659, 676; see *United States v Bravo* (9th Cir. 2002) 295 F.3d 1002, 1010 ["handcuffing is a substantial factor in determining whether an individual has been arrested"].) But a well-respected treatise has explained: "The years since [*United States v. Hensley* (1985) 469 U.S. 221] have 'witnessed a multifaced expansion of *Terry*,' especially a 'trend granting officers greater latitude in using force in order to "neutralize" potentially dangerous suspects during an investigatory detention.' 'For better or for worse,' as yet another federal court expressed it, 'the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.' " (4 LaFave, Search and Seizure (5th ed. 2012) § 9.2(d), p. 401, fns. omitted.) Defendant does not challenge his

[suspect's release back into the general prison population where he was serving an unrelated sentence constitutes a break in *Miranda* custody].)

For example, in *Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*), the United States Supreme Court concluded that "the roadside questioning of a motorist detained pursuant to a routine traffic stop" does not constitute custodial interrogation for *Miranda* purposes. (*Id*. at pp. 435-436.) The court acknowledged that "few motorists would feel free either to disobey a [police officer's] directive to pull over or to leave the scene of a traffic stop without being told they might do so." (*Id*. at p. 436, fn. omitted.) The court noted that routine traffic stops are typically temporary, brief, and public to some degree. (*Id*. at pp. 436-438.) The court analogized ordinary traffic stops to investigative *Terry* detentions. (*Id*. at p. 439.) It reasoned: "The comparatively nonthreatening character of [investigative] detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*." (*Id*. at p. 440.)

The Supreme Court was not concerned that its holding in *Berkemer* would engender "widespread abuse" by police. (*Berkemer*, *supra*, 468 U.S. at p. 440.) The court stated: "It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*). If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. [Citation.]" (*Ibid*.) But the court declined to establish a bright-line "rule that *Miranda* applies to all traffic stops or a rule that a suspect

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seizure under the Fourth Amendment, on the ground that the seizure was an unreasonable investigative detention or an unlawful arrest without probable cause.

need not be advised of his rights until he is formally placed under arrest." (*Id*. at p. 441.) It recognized that under its holding, "the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody [for *Miranda* purposes]." (*Ibid*.)

Even if a suspect is subjected to restraints comparable to those associated with formal arrest and considered in custody for purposes of *Miranda*, the United States Supreme Court has recognized a public safety exception to the *Miranda* requirements. In *New York v. Quarles* (1984) 467 U.S. 649 (*Quarles*), the United States Supreme Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved." (*Id*. at pp. 655-656.) The court made clear that "the doctrinal underpinnings of *Miranda*" do not "require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." (*Id*. at p. 656.)

In *Quarles*, the police apprehended Quarles, a suspected rapist who was believed to be carrying a gun, in a supermarket. (*Quarles*, *supra*, 467 U.S. at pp. 651-652.) After an officer frisked Quarles, discovered that he was wearing an empty shoulder holster, and handcuffed him, the officer asked him where the gun was. (*Id*. at p. 652.) Quarles "nodded in the direction of some empty cartons and responded, 'the gun is over there.' " (*Ibid*.) The officer "retrieved a loaded .38-caliber revolver from one of the cartons, formally placed [Quarles] under arrest, and read him his *Miranda* rights from a printed card." (*Ibid*.) The United States Supreme Court found that Quarles was in police custody for *Miranda* purposes because he "was surrounded by at least four police officers and was handcuffed when the questioning at issue took place." (*Id*. at p. 655.)

Although the Supreme Court agreed that Quarles was in police custody when he was asked about the gun, the court concluded that "overriding considerations of public

safety justif[ied] the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." (*Quarles*, *supra*, 467 U.S. at p. 651.) The court stated: "The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it [or] a customer or employee might later come upon it." (*Id*. at p. 657.) It made clear that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." (*Ibid*.) The court believed that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." (*Id*. at pp. 658-659.)

In *Berkemer*, the United States Supreme Court described *Quarles* as holding that "when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public." (*Berkemer*, *supra*, 468 U.S. at p. 429, fn. 10.)

3. *Analysis*

In this case, assuming arguendo that defendant was in custody for *Miranda* purposes because he was being handcuffed, or had just been handcuffed, when he was asked by Officer Knowlton where his friends were, the public safety exception to *Miranda* applied.

The police officers were responding to a report that a residential burglary was in progress. The reporting party had indicated that three persons were involved in the

burglary. The driver was waiting in a white SUV and two others had gone into a residence. When Officers Knowlton and Yoneda arrived at the scene, defendant was sitting in the driver's seat of the white Chevy Tahoe and the two other suspects were unaccounted for. Given the fluid and ongoing situation, it was imperative that the police immediately locate the two other burglary suspects, possibly still inside the residence, for the safety of the public as well as the responding officers. It was very possible that the suspect burglars had weapons for the reasons Officer Yoneda stated at the hearing and that persons in the vicinity might come in harm's way if the suspects tried to avoid apprehension or were surprised by the officers or others.

We do not agree with defendant that the lack of specific information that the burglary suspects had weapons meant that the public safety exception to *Miranda* did not apply. Police officers can consider their experience and training in determining whether burglary suspects in a residential burglary reportedly in progress pose a potential danger to the public and the officers. It was reasonable to conclude that the officers needed to know the whereabouts of the two burglary suspects at large because of the danger they posed.

The language of *Quarles* applies here: "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings" (*Quarles*, *supra*, 467 U.S. at p. 657) or whether they should take the time to administer *Miranda* warnings and possibly increase the risks to themselves and others given the exigency. The Supreme Court believed the public safety exception would not "complicat[e] the thought processes and the on-the-scene judgments of police officers" (*id*. at p. 659) but rather would "simply free them to follow their legitimate

instincts when confronting situations presenting a danger to the public safety." (*Ibid*., fn. omitted.)

B. *Alleged Ineffective Assistance of Counsel*

Defendant claims that there were three instances of ineffective assistance of counsel at trial. One instance involved a question posed by defense counsel during his cross-examination of Officer Aranda, who had responded to the scene and spoken to J.F. Two instances involved defense counsel's failure to object to comments made by the prosecutor during closing argument.

1. *Governing Law*

The standard for evaluating a claim of ineffective assistance of counsel is well established. It requires a two-prong showing of deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id*. at p. 700.)

As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Strickland, supra*, 466 U.S. at p. 688.) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id*. at p. 689.) "[E]very effort" must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Ibid*.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Ibid*.)

The prejudice prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.)

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. [Citation.] This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' [Citation.] The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 111-112 (*Harrington*).)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

2. *Questions Posed to Officer Aranda on Cross-examination*

a. *Background*

The trial court ruled that the prosecution could question Officer Aranda on direct examination about J.F.'s statements concerning (1) the two people that he had seen exiting the vehicle and his description of them, (2) the direction in which J.F. had seen the driver looking, and (3) the time between J.F.'s seeing the two people getting out of the vehicle and his hearing a knock on the door of his neighbor. The trial court indicated that in connection with the second area of direct examination, defense counsel would be permitted to cross-examine the officer regarding J.F.'s "not being able to look over [at the driver] too much" and J.F.'s "inability to pick someone out of the lineup identification [*sic*]."

On cross-examination, defense counsel asked Officer Aranda whether he had read an admonishment regarding an in-field showup to J.F. Officer Aranda replied, "No, because he never wanted to identify the defendant on that day." Defense counsel then asked, "And he never did identify the defendant in the showup, correct?" The officer answered, "[P]ersonally, he did not, no."

On redirect examination, the prosecutor asked Officer Aranda what he had meant by his answer. Defense counsel objected on hearsay and lack of foundation grounds. The objection was overruled. The officer testified, "He stated it was the person we had in custody." The court asked, "To you?" The officer replied yes.

Outside the presence of the jurors, the prosecutor indicated that he wished to ask Officer Aranda what he meant when he used the word "personally." Defense counsel complained that the question was "a back door way of getting in what would be objectionable evidence" and that the prosecution had not laid a foundation for an actual identification of defendant by J.F. The prosecutor argued that defense counsel's identification question encompassed the officer's "whole contact" with J.F. and his use of the word "never" suggested that J.F. had never identified defendant, which the prosecutor asserted was "patently false."

The court ruled that the prosecutor would be allowed "to clarify that last point, move in and move out very quickly if you can in terms of what was said by the witness in terms of any prior identification, . . . in response to the question that [defense counsel] had asked that witness."

On further redirect examination of Officer Aranda, the prosecutor elicited testimony regarding J.F.'s informal identification of defendant, who was sitting in a patrol car across the street, by a glance and the statement "that's him."

b. *Analysis*

Defendant argues that defense counsel's cross-examination question to Officer Aranda ("And he never did identify the defendant in the showup, correct?") constituted

ineffective assistance of counsel because counsel already knew that J.F. had identified him on the day of the burglary, although not in a formal, in-field showup. He suggests that if his counsel had not asked that question, "there would have been no evidence adduced that [he] was the specific driver of the white truck who had dropped off the two suspected burglars." He contends that "[w]ithout evidence that it was not only the same truck, but [also] the same driver, that [J.F.] saw that day, at least one rational juror would have entertained the possibility that [he] was not driving the white truck when the two suspects were dropped off." Defendant asserts that there could be no tactical justification or satisfactory explanation for counsel's asking the showup question, which opened the door to the admission of "damaging testimony." Defendant argues that the prejudice prong is satisfied because "[a]lthough it was undisputed that the same white truck had dropped off the two people, and then parked across the street where it was approached by officers, it was not clear that the same driver had dropped off the two suspects" until Officer Aranda testified about J.F.'s identification of defendant at the scene.

" ' "It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he [or she] may be examined on redirect as to such new matter." ' [Citation.] ' "The extent of the redirect examination of a witness is largely within the discretion of the trial court." ' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 921.)

"Cross-examination is always a risky process—even experienced counsel conducting a brilliant cross-examination might inadvertently elicit damaging disclosures, a risk inherent in the tactical decision to conduct cross-examination." (*People v. Ervin* (2000) 22 Cal.4th 48, 94.) In general, "the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make. [Citation.] 'Even where defense counsel may have " 'elicit[ed] evidence more damaging to [the defendant] than the prosecutor was able to accomplish

on direct' " [citation], [courts] have been "reluctant to second-guess counsel" [citation] where a tactical choice of questions led to the damaging testimony.' [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

It is not clear to us that defense counsel's cross-examination question necessarily constituted deficient performance. Defense counsel's cross-examination elicited evidence from Officer Aranda that J.F. had refused to participate in a formal in-field showup. Officer Aranda indicated that he had asked J.F. several times whether he wanted to identify defendant in the field, but J.F. did not want to identify the driver.

First, when defense counsel asked the showup question, it was not a foregone conclusion that the trial court would allow the prosecutor to ask Officer Aranda on further redirect examination whether J.F. had informally identified defendant. Second, in light of the damaging evidence of the 911 call, the police scanner in the white Chevy Tahoe, and the paper dealer plates concealing the actual license plates, defense counsel could have reasonably made a tactical decision to confirm that J.F. never did identify defendant in a showup. Third, instead of plainly answering the defense attorney's yes or no question, the officer gave a cryptic reply ("[P]ersonally, he did not, no"], which raised the need for further explication.

Defense attorneys have "wide latitude" in making tactical decisions. (*Strickland, supra*, 466 U.S. at p. 689.) In assessing attorney performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*ibid.*) and strive "to eliminate the distorting effects of hindsight." (*Ibid.*)

In any event, even if we were to conclude that defense counsel's cross-examination fell below professional norms, defendant has not satisfied the prejudice prong of an ineffective assistance of counsel claim. There was evidence that J.F. told the 911 operator that someone had broken into and was burglarizing the apartment next to his. He said one person was waiting outside in a white truck, which had paper dealer

plates that said C & J Auto Sales. He reported that two "guys" had gone inside his next-door neighbor's apartment. J.F. later said the vehicle was a white Explorer. He reported seeing someone go by his apartment, heard a loud noise that sounded like the breaking of a door or window, and was hearing a lot of noise that sounded like they were "searching through everything." He continued to report hearing noise that sounded as if they were searching through everything, and he then reported that the noise was coming from the back of his neighbor's residence. When the 911 operator asked whether he could still see the vehicle, J.F. reported that officers had already arrested the man in the truck. When asked whether the officers were with the correct vehicle, "the suspicious one," J.F. indicated yes.

The evidence of Officers Knowlton's quick arrival and contact with defendant in a white vehicle with the paper dealer plates, his handcuffing of defendant, and the ransacked condition of the burglarized apartment was largely consistent with the information given by J.F. to the 911 operator. Further, J.F had told Officer Aranda on September 13, 2016 that he heard knocking at his neighbor's door about a minute after he saw two men got out of the suspect vehicle and that he saw the waiting driver looking in the direction of his neighbor's apartment.

There was an ample evidentiary basis for the jury to credit J.F.'s statements to the 911 operator over his inconsistent and evasive trial testimony. The evidence indicated that J.F was afraid of defendant. In addition to the recorded 911 call and J.F.'s statements to Officer Aranda near the time of the burglary, there was incriminating evidence that the suspect vehicle contained an electronic scanner monitoring the channel that was being used by Salinas Police Department and that its paper dealer plates concealed actual license plates.

Defendant has failed to demonstrate that there is a reasonable probability that the result of the proceeding would have been different if defense counsel had not asked Officer Aranda to confirm that J.F. had never identified defendant in a showup.

(See *Strickland*, *supra*, 466 U.S. at p. 694; *Harrington*, *supra*, 562 U.S. at pp. 111-112.) We reject this claim of ineffective assistance of counsel. (See *Strickland*, *supra*, at pp. 687, 700.)

3. Failure to Object to Alleged Griffin *Error in Closing Argument*

a. *Background*

In closing argument, the prosecutor proposed two possible theories that the defense might raise to the burglary charge. The first theory was that defendant had been the only one in the white Chevy Tahoe and had not dropped anyone off. But the prosecutor already had argued that defendant's statement to Officer Aranda that he did not have any friends was "simply untrue." The prosecutor offered a second possible defense theory that defendant had "dropped off the two guys" but "he had no idea that they were going to burglarize anything."

The prosecutor then posed a series of questions to the jury: "[W]hy was [defendant] in front of the house? Why is he even there in general? Why did he drive around in a span of eight minutes multiple locations in the same area?" The prosecutor also asked: "Why rev the engine three times when you're stationary outside a residence? Why did he have a police scanner right next to him? Why would his actual license plate cover it? Why was he not surprised at all by the question by Officer Yoneda and Officer Knowlton of where are your friends? Why wasn't his response who? What? What are you talking about?"

As to the second possible defense scenario posed by the prosecutor, the prosecutor asked the jurors where are "those two guys to tell you" what they were doing, and the prosecutor told the jurors that "[t]he defense can call witnesses too." He argued that the defense failed to call logical witnesses and suggested that the defense could have called them if defendant "didn't know what those two guys were doing" or if "what they were doing was innocent." The prosecutor asked, "Where is the evidence [that] he had any other purpose [aside from burglary]?"

b. *Analysis*

Based on the prosecutor's closing argument, defendant now argues that defense counsel rendered ineffective assistance of counsel by failing to object to *Griffin* error. (See *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).) In *Griffin*, the United States Supreme Court held that a defendant's refusal to testify at trial may not be used as evidence of his guilt. (*Id*. at p. 614.) Consequently, the Fifth Amendment right against self-incrimination, applicable to the states through the Fourteenth Amendment (*Malloy v. Hogan* (1964) 378 U.S. 1, 6, 8), prohibits both prosecutorial comment on a criminal defendant's failure to testify at trial and jury instructions that such silence is evidence of guilt. (*Griffin*, *supra*, at p. 615.)

"[A] prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*).) "The Fifth Amendment prohibits a prosecutor from commenting, directly or indirectly, on a defendant's decision not to testify on his own behalf. [Citations.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 632-633 (*Taylor*).) *Griffin*'s holding "does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*Bradford*, *supra*, at p. 1339.)

Defendant asserts that *Griffin* error occurred because only he "could answer the prosecutor's closing questions . . . ." Here, the prosecutor's queries amounted to proper comment on the evidence against defendant. "Contrary to defendant's argument, on this record, there is no reasonable likelihood the jury understood the prosecutor's remarks as an invitation to draw an improper inference of guilt from defendant's decision not to testify. [Citation.]" (*Taylor*, *supra*, 48 Cal.4th at p. 633.) Further, as suggested by the prosecutor's closing argument, defendant could have called the two passengers who were

seen leaving the white Chevy Tahoe to show that he had a purpose other than aiding and abetting a burglary. (See *People v. Thomas* (2012) 54 Cal.4th 908, 945 [no *Griffin* error where "prosecutor's comments were framed in terms of the [defendant's] failure to call some person *other than* [*the*] *defendant*"].)

Moreover, "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) Defense counsel may have reasonably decided that he did not want "to draw the jurors' attention to particular comments by the prosecutor by objecting to them." (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) In any event, defense counsel could have reasonably concluded, as have we, that he did not have a valid *Griffin* objection because the prosecutor was merely commenting on the state of evidence and the defense's failure to call two logical witnesses other than defendant. (See *People v. Clair* (1992) 2 Cal.4th 629, 663 [no *Griffin* error because there was no reasonable likelihood that jury understood the prosecutor's argument in context to be a comment on defendant's failure to testify].) "Representation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.)

" 'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) Contrary to defendant's assertion, this is not a case where there could be no conceivable reason for defense counsel's failure to object to argument on the ground of *Griffin* error.

Defendant has failed to establish that defense counsel's failure to object to the prosecutor's closing argument on the ground of *Griffin* error constituted deficient performance. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) We reject this claim of ineffective assistance. (See *id*. at pp. 687, 700.)

4. *Failure to Object to Prosecutor's Argument as Appeal to the Jury's Sympathy*

a. *Background*

In closing argument, the prosecutor contended that J.F.'s statements during the 911 call, during which he was relating events as they were unfolding, were more credible than J.F.'s testimony at trial. He argued that J.F. was "scared in court." The prosecutor stated: "Unfortunately, people who try to do the right thing and report crime, they have to come in and talk. There's no way to actually get the evidence unless they come in and share. And that may make them feel they're being put at risk, their family's put at risk. But that's our system so that we can prove our case." The prosecutor suggested that J.F.'s "only personal interest was trying to be safe" and that interest should not be held "against what he reported initially." He said: "[J.F.] lives in East Salinas. He has perceptions of what goes down, perceptions and situations that you may not have to deal with in your daily life. But those are real for him."

In arguing the defense case, defense counsel suggested that defendant's response that he did not have any friends was "consistent with someone living in East Salinas, they're not as cooperative with police." He stated: "[L]iving in East Salinas, you don't want to be seen cooperating with police. It's part of your makeup, you don't necessarily cooperate with police all the time. When police start pulling you out of a car, placing you in cuffs, you may not be so receptive as to what was actually going on." He compared defendant to J.F., stating that "they don't want to be seen cooperating." Defense counsel said, "[T]hat's what I believe explains [defendant's] lack of forthcomingness to police officers when this happened."

In his rebuttal, the prosecutor suggested that the comparison of J.F. to defendant was disrespectful. He argued: "I think it's disrespectful to the residents of East Salinas who are good people, who are good people there with families, just as American as you or I, trying to live their daily lives. [¶] And you heard from . . . two of them. You didn't hear about any convictions on those people. You didn't hear about them doing anything

wrong. Those are good people too, they just live in a rough area and the rough area affects how they behave. [¶] Now, they live in a rough area because of people like Mr. Santana. . . . And I think that's unfair to compare [defendant Santana] to [J.F.] So think about that in evaluating evidence because I don't think that's an apt comparison. I think that's disrespectful to good people who live in East Salinas."

b. *Analysis*

Defendant asserts that he was deprived of effective assistance of counsel when defense counsel failed to object to the prosecutor's improper appeal to the jury's sympathy and passion during closing argument, which he asserts occurred when the prosecutor asked the jurors to sympathize with the residents of East Salinas.

" 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1210.) For example, "[a]s a general rule, a prosecutor may not invite the jury to view the case through the victim's eyes [in the guilt phase] because to do so appeals to the jury's sympathy for the victim. [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) Similarly, in a prosecution for the kidnapping of a five-year-old child and a five-month-old child and the murder of the younger one, the prosecutor's argument asking jurors to imagine that this had happened to one of their children was an improper appeal to the jury's sympathy or passion. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1230, 1250.)

Nevertheless, " '[a] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 768.) In this case, the prosecutor's argument addressed J.F.'s evasive and inconsistent testimony at trial that deviated from his statements to the 911 operator and

Officer Aranda. He asked the jurors to credit J.F.'s earlier statements. The prosecutor's rebuttal comments were a response to defense counsel's likening of defendant's attitude toward police to J.F.'s. In an attempt to differentiate defendant from J.F., who he had recognized was scared in court, the prosecutor called defense counsel's comparison disrespectful to Salinas's good residents. The prosecutor's argument did not "encourage the jury to subordinate their reason to emotion. [Citation.]" (*People v. Winbush* (2017) 2 Cal.5th 402, 486.)

Defense counsel could have reasonably concluded, as have we, that the prosecutor did not improperly appeal to the jury's sympathy and passion and his argument was within the wide latitude accorded prosecutors to make fair comment upon the evidence. A defense counsel does not act deficiently by failing to make objections that he or she reasonably believes would disserve a defendant (see *People v. Harris* (2008) 43 Cal.4th 1269, 1290) or are meritless. (See *People v. Farnam* (2002) 28 Cal.4th 107, 186, fn. 36.)

Defendant has not demonstrated that defense counsel acted deficiently by failing to object to the prosecutor's closing argument on the ground that he was appealing to the jury's sympathy or passion. (*Strickland, supra*, 466 U.S. at pp. 687-688.) This claim of ineffective assistance must be rejected as well. (See *id*. at pp. 687, 700.)

C. *Claim of Cumulative Prejudice*

Defendant maintains that he was unconstitutionally deprived of a fair trial "due to the cumulative prejudice flowing from [his] counsel's multiple errors." We have found no errors and consequently no prejudice to cumulate. (See *People v. Ghobrial* (2018) 5 Cal.5th 250, 293.)

D. *New Discretion to Strike Enhancement for a Prior Serious Felony Conviction*

Defendant argues that under the retroactivity rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), this court should remand the matter to allow the trial court to exercise its discretion as to whether to dismiss or strike the prior serious felony enhancement, as now permitted under section 1385. The People contend that defendant's

argument is "not ripe because the statutory amendment authorizing such action will not become effective until January 1, 2019." This contention is no longer valid because the legislation is now in effect.

Effective January 1, 2019 (see Stats. 2018, ch. 1013, § 2, p. 6672 [Sen. Bill No. 1393]; Gov. Code, § 9600, subd. (a)), section 1385 was amended to delete the provision prohibiting a judge from striking a prior serious felony conviction enhancement. Section 667, subdivision (a), also was amended to omit its reference to section 1385, subdivision (b). (See Stats. 2018, ch. 1013, § 1, pp. 6668-6669 [Sen. Bill No. 1393].) Section 1385 now permits a court "in furtherance of justice" to exercise its discretion to strike or dismiss a five-year enhancement for a prior serious felony conviction.

The People do not dispute that after January 1, 2019, the new law applies to nonfinal judgments under the *Estrada* rule. "[N]ewly enacted legislation mitigating criminal punishment reflects a determination that the 'former penalty was too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' (*Estrada, supra,* 63 Cal.2d at p. 745.) The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citation.] 'The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 881-882.)

The People's alternative argument is that a remand is unwarranted because "the trial court's statements at sentencing clearly indicated that it would not have dismissed the [five-year prior serious felony] enhancement in any event." They assert that the trial

court's statements explaining its refusal to strike defendant's prior residential burglary conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 are "damning to [defendant's] request for resentencing" with regard to the enhancement and "clearly indicate [that] the court would not have dismissed his prior serious felony enhancement even had it possessed discretion to do so."

We agree that the record suggests that it is unlikely that the court would have exercised its discretion under section 1385 to strike or dismiss the enhancement if it had had such discretion. In ruling on defendant's *Romero* motion, the trial court considered whether defendant fell outside the spirit of the Three Strikes law. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) It noted that defendant's prior strike conviction was also for a residential burglary, which was committed in 2011, and that defendant did not successfully complete probation in that case. The court pointed out that defendant committed another felony in 2014,[4] and he was sentenced to imprisonment. The residential burglary for which defendant was convicted in this case was committed in 2016 after defendant was released to "PRCS" (postrelease community supervision).

The trial court never stated, however, that the crime was so heinous that it would maximize defendant's sentence to the full extent of the law or that it would have imposed the five-year enhancement even if it had had the discretion under the law not to do so. (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required [under the newly amended section 12022.53] unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 ["Reconsideration of sentencing is required under *Romero* where the trial court believed

[4] The People's opposition to defendant's *Romero* motion indicated that the offense was a violation of section 29800 (felon in possession of a firearm) and occurred approximately two months after he was paroled for the prior residential burglary conviction.

it did not have discretion to strike a [T]hree [S]trikes prior conviction [under section 1385], unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].)

At sentencing, the trial court imposed a 12-year term on the first degree burglary conviction (double the upper term of six years) and stated that it was adding the five-year prior serious felony enhancement that it "can't strike." The prior residential burglary conviction that was the basis for sentencing under the Three Strikes law was also the basis for the prior serious felony enhancement. The trial court additionally imposed a one-year prior prison term enhancement (§ 667.5, subd. (b)). However, it struck the second one-year prior prison term enhancement under section 1385.

Although it seems doubtful that the trial court would have exercised its discretion to strike the prior serious felony enhancement if it had had the discretion to do so, the record before us does not reflect that the trial court necessarily would have declined to do so. Accordingly, a remand is appropriate to allow the trial court to decide whether to exercise its discretion to strike the prior serious felony enhancement under the current section 1385.

DISPOSITION

The judgment is reversed, and the matter is remanded for the limited purpose of resentencing in light of current section 1385.

_____

ELIA, ACTING P. J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

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